IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~1499~~ 70-99

EVANSVILLE-VANDERBURGH AIRPORT AUTHORITY DISTRICT, *et al.*, *Petitioners*,

v.

DELTA AIRLINES, INC., *et al.*, *Respondents*.

RESPONDENTS' BRIEF IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

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THE QUESTION PRESENTED

For reasons stated in the Argument, *infra* at 3, the two questions posed by Petitioner are more properly stated as one:

Whether the Airport Board's exaction of $1.00 for the act of enplanement by each commercial airline passenger violates the Commerce Clause of the United

States Constitution where the exaction is imposed directly on the passengers, 88% of whom are departing the airport into interstate commerce, without regard to any actual use they make of airport facilities, and where such passengers constitute a minority of all persons using such facilities.

SUPPLEMENTAL STATEMENT OF THE CASE

Although Petitioners' statement of the case is correct as far as it goes, it omits facts required to give an accurate picture of the procedural posture of this case. Respondents' two complaints each challenged in separate counts the validity of Ordinance No. 33 on three separate constitutional grounds:

(1) Ordinance No. 33 imposes a burden on interstate commerce in violation of the Commerce Clause. R. 16-17, 269.

(2) Ordinance No. 33 interferes with the right of passengers to travel among the several states. R. 22, 273.

(3) The burden of Ordinance No. 33 falls on an irrationally drawn class of persons, in violation of the Equal Protection Clauses of the Fourteenth Amendment and the Indiana constitution. R. 28, 277.

These grounds were kept separate in the briefs of both parties in the trial court, and the trial court entered separate conclusions of law holding Ordinance No. 33 invalid on each ground. R. 330-31, 404-05. But Petitioners completely ignored the right-to-travel issue in their briefs to the Indiana Supreme Court and

treated only the Commerce Clause and equal protection issues. Respondents' brief in that court pointed out (at 13-16, 31-37) that, under Indiana procedural rules, Petitioners had thereby abandoned the right-to-travel issue and that this abandonment required affirmance on that independent ground for the decision of the trial court. However, the Indiana Supreme Court's opinion neither addressed itself to the question whether the right-to-travel issue was properly before it, nor did it express any view on the merits of that issue. It also ignored the equal-protection issue, basing its decision entirely on Commerce Clause grounds.

ARGUMENT

I. The Decision Below Is in Accord With the Applicable Decisions of This Court

Both of The Questions Presented as stated in the Petition (Pet. 2) invite this Court to consider whether the Airport Board is permitted by the Commerce Clause to impose user charges or services fees on persons using facilities furnished by the Authority. Of course it may, and neither the courts below nor the Respondents have contended that the Airport Board may not impose *proper* user charges. The issue in this case is whether the particular provisions of Ordinance No. 33 establish a valid user charge or whether, as the court below unanimously held, those provisions fail to conform to all of the Commerce Clause standards for a valid user charge as enunciated in the decisions of this Court.

Petitioners concede (Pet. 12) that one such standard is whether Ordinance No. 33 embodies a "uniform, fair, and practical standard" bearing a reasonable relationship to the use of facilities owned by the Airport

Board. *Hendrick* v. *Maryland*, 235 U.S. 610, 624 (1915). *Accord, McCarroll* v. *Dixie Greyhound Lines, Inc.*, 309 U.S. 176 (1940); *Interstate Transit, Inc.* v. *Lindsey*, 283 U.S. 183 (1931); *Sprout* v. *City of South Bend*, 277 U.S. 163 (1928). The opinion below lists in detail the facilities furnished by the Airport Board (Pet. App. A 18) and the classes of persons making use of them (Pet. App. A 19), and those facts need not be repeated here. It is sufficient that on those facts there is no relationship between the extent to which a person subject to the boarding tax imposed by Ordinance No. 33 uses those facilities and the fact of his enplaning a commercial aircraft. Pet. App. A 20-22. Indeed, a majority of the persons using the facilities are subject to no tax even though their actual use of the facilities is "no different" from the use by enplaning passengers (Finding No. 39, R. 327-28) and may often be more extensive. Pet. App. A 20.

Although it did not do so, the court below might also have rested its decision on other Commerce Clause cases which establish additional standards of validity not met by Ordinance No. 33. There is an absolute ban on state taxes the operating incidence of which is on an integral aspect of interstate commerce.

> "It is now well settled that a tax imposed on a local activity related to interstate commerce is valid if, and only if, the local activity is not such an integral part of the interstate process, the flow of commerce, that it cannot realistically be separated from it."

Michigan-Wisconsin Pipe Line Co. v. *Calvert*, 347 U.S. 157, 166 (1954) (Commerce Clause decision involving the movement of natural gas). *Accord, Memphis Nat-*

ural Gas Co. v. *Stone,* 335 U.S. 80 (1948). The situation is the same with respect to the instant case since "the operating incidence of the charge is solely the act of enplaning upon a commercial airline." Finding No. 23, R. 324. The enplanement of departing commercial air passengers at Dress Memorial Airport "cannot be realistically separated" from taxiing to the runway, takeoff, and landing in another state. Thus, a tax incident on enplaning is "in reality a condition of departure . . . into interstate commerce" (Finding No. 38, R. 327) and invalid under the Commerce Clause. *See also Railway Express Agency, Inc.* v. *Virginia,* 347 U.S. 359, 368 (1954) ("local incidents such as gathering up or putting down interstate commodities as an integral part of their interstate movement are not adequate ground for a state license, privilege or occupation tax"); *Spector Motor Service, Inc.* v. *O'Connor,* 340 U.S. 602 (1951) (tax on the privilege of conducting an interstate business); *Freeman* v. *Hewit,* 329 U.S. 249 (1946) (tax on the act of interstate sale itself).

The reason for the flat prohibition against direct taxes on interstate commerce is that there are no standards by which the reasonableness of the amount of such a tax can be measured. Therefore, sustaining the power to tax at all would imply that a state could tax at will and completely interdict the activity.

> "The same power that may impose a tax of two cents per ton upon coal carried out of the State, may impose one of five dollars. Such an imposition whether large or small, is a restraint of the privilege or right to have the subjects of commerce pass freely from one State to another without being obstructed by the intervention of State lines.
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> "* * * It is of national importance that over that subject there should be but one regulating power, for if one State can directly tax persons or property passing through it, or tax them indirectly by levying a tax upon their transportation, every other may, and thus commercial intercourse between States remote from each other may be destroyed."

Case of the State Freight Tax, 82 U.S. (15 Wall.) 232, 276, 280 (1873).

Ordinance No. 33 also offends the Commerce Clause because it effectively discriminates against interstate commerce. Whether an exaction works a discrimination against interstate commerce is to be determined by an examination of its actual operation. "In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce." *Best & Co.* v. *Maxwell,* 311 U.S. 454, 455-56 (1940). *Accord, Halliburton Oil Well Cementing Co.* v. *Reily,* 373 U.S. 64 (1963).

Examination of the operating incidence of Ordinance No. 33 shows that it falls exclusively on a class of passengers, approximately 88 percent of whom are traveling in interstate commerce. Finding No. 16, R. 321; Pet. App. A 17. Among those, similarly situated in terms of use made of the airport, who are not subject to the levy are a substantial number whose activities are purely intrastate. In particular, these include non-travelers who visit the airport for the purpose of meeting or seeing off travelers or using restaurant, bar, car rental, air freight, or other facilities, as well as large numbers of noncommercial aviators and passengers. (Finding Nos. 19, 20, 26-27, R. 322-23, 325.)

It is clear that exempted groups using the airport include a substantial number of persons whose activities have no interstate ramifications and who are not required to pay the fee imposed by Ordinance No. 33 or any similar exaction. The Ordinance is no less discriminatory against interstate commerce because it may affect a small number of intrastate passengers or because it is not levied against all interstate passengers. It is enough that it is levied discriminatorily on a single group that consists predominantly of interstate passengers, and thus is discriminatory in its application or effect. *Nippert* v. *City of Richmond,* 327 U.S. 416 (1946).

Ordinance No. 33 also discriminates against interstate commerce because, with all the other available sources of revenue, the Airport Board chose an incident of taxation which lends itself to repeated exactions in other states. If one state may tax enplanement, other states may tax deplanement and stopovers. Such multiple burdens would tend to fall much more heavily on long-distance and interstate travelers, in violation of the principle stated in *Memphis Natural Gas Co.* v. *Stone,* 335 U.S. 80 (1948):

> "There are always convenient local incidents in every interstate operation. * * * The incident selected should be one that does not lend itself to repeated exactions in other states. Otherwise intrastate commerce may be preferred over interstate commerce."

Id. at 87 (citation omitted).

Another line of cases supporting the decision below was apparently relied on by the trial court (R. 330)

and has been adopted by other courts which have considered the validity of similar state-imposed airport head taxes. *Northwest Airlines, Inc.* v. *Joint City-County Airport Bd.*, 154 Mont. 352, 463 P.2d 470 (1970); *Allegheny Airlines, Inc.* v. *Sills*, 110 N.J. Super. 54, 264 A.2d 268 (1970) (appeal dismissed). The leading case is *Crandall* v. *Nevada*, 73 U.S. (6 Wall.) 35 (1868), which rests on the right of United States citizens to travel freely among the States.[1] In *Crandall* this Court struck down a head tax strikingly similar to that imposed by Ordinance No. 33. The State of Nevada had levied a tax of one dollar upon every person leaving the state by railroad, stagecoach, or other vehicle engaged in transporting passengers for hire. The tax was to be collected by the carrier and reported monthly to the state. Crandall, agent of a stage company, was convicted for refusing to report the number of passengers carried and for nonpayment of the tax. In reserving his conviction, this Court did not consider the reasonableness of the amount of the tax but instead held there is an absolute ban on such

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[1] The right to travel may be based in part on the Commerce Clause, but it is clear that that is not its sole foundation. It has been suggested that the right to travel is one of the privileges and immunities protected by the Fourteenth Amendment. *See, e.g.*, *Twining* v. *New Jersey*, 211 U.S. 78, 97 (1908); *Williams* v. *Fears*, 179 U.S. 270, 274 (1900); *Edwards* v. *California*, 314 U.S. 160 (1941) (concurring opinions of Douglas, J., and Jackson, J.). The right to travel has been based on the Privileges and Immunities Clause of Article IV, Section 2. *See Ward* v. *Maryland*, 79 U.S. (12 Wall.) 418, 429-30 (1871); *Paul* v. *Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869). And it has been deemed to be an inherent premise of the federal concept of the Constitution. *Shapiro* v. *Thompson*, 394 U.S. 618, 629-31 (1969); *United States* v. *Guest*, 383 U.S. 745, 757-58 (1966).

taxes which impinge directly on an integral aspect of interstate travel.

> "* * * [*I*]*f the State can tax a railroad passenger one dollar, it can tax him one thousand dollars. If one State can do this, so can every other State.* And thus one or more States covering the only practicable routes of travel from the east to the west, or from the north to the south, may totally prevent or seriously burden all transportation of passengers from one part of the country to the other."

Id. at 46 (emphasis added).

The apprehended evils underlying the decision in *Crandall* are also clearly present in Ordinance No. 33.

> "* * * The exaction falls on the act of emplanement, which is equivalent to the act of departure and therefore is an integral aspect of interstate travel. If the state is empowered to tax the act of departure no inherent limits exist as to the amount of the charge. The right of the airport to tax the act of emplanement cannot logically be distinguished from the right of the airport to tax the act of deplanement. By the same token, arrival and departure taxes could be levied by airports at each point of intermediate stopover or transfer on a passenger's route. Since no rational basis exists for apportioning the right to tax arrival and departure among the various airports through which a traveler might pass, there is nothing to prevent the accumulation of crippling burdens on interstate air travel. Clearly the power to tax the act of departure, even where the exaction is small, encompasses the power to prohibit departure completely and to impose crippling cumulative burdens on interstate travel."

Northwest Airlines, Inc. v. *Joint City-County Airport Bd.*, 154 Mont. at 356, 463 P. 2d at 473. *See also People* v. *Compagnie Generale Transatlantique*, 107 U.S. 59 (1883); *Henderson* v. *Mayor of New York*, 92 U.S. 259 (1876); *Chy Lung* v. *Freeman*, 92 U.S. 275 (1876); *The Passenger Cases*, 48 U.S. (7 How.) 283 (1948).

Finally, the decision below may also be supported on the ground that it violates the Equal Protection Clause of the Fourteenth Amendment, as the trial court held. R. 331. The trial court also held that Ordinance No. 33 violates the Equal Protection Clause of the Indiana constitution, Article I, Section 23. R. 331.

II. A Decision in This Case by This Court Is Likely To Have Only Minor Impact Outside Vanderburgh County, Indiana

Contrary to Petitioners' unsupported assertion (Pet. 7) that a decision by this Court in this case would be "of far-reaching importance to all state and municipal taxing bodies where facilities are provided for interstate, as well as intrastate, commerce. . . ," Respondents are aware of only one other state or local head tax which could conceivably be affected. At the time this lawsuit was commenced, there were three other state and local governments collecting or threatening to collect airport head taxes. Two of these taxes are now subject to permanent injunctions issued by judicial decrees which have become final. *Northwest Airlines, Inc.* v. *Joint City-County Airport Bd.*;[3] *Allegheny Air-*

[3] Petitioners' statement (Pet. 6) that the Montana Supreme Court held in the *Northwest Airlines* case that there was no need for revenues to maintain and operate the Helena airport is diametrically opposed to the facts. The court stated:

"There is no issue before the Court as to the need for revenue to maintain and operate the Helena airport nor as to

lines, Inc. v. *Sills.* The only head tax case still pending is *Northeast Airlines, Inc.* v. *New Hampshire Aeronautics Comm'n,* — N.H. —, 273 A.2d 676 (1971), Pet. App. C, where the New Hampshire Supreme Court upheld what it termed a service charge imposed on commercial air carriers (not passengers). Petitioners assert that the airlines are "virtually certain" to appeal that case to this Court and they appear to advance that as a principal reason for granting the writ in this case. Pet. 7. The undersigned, two of whom are also counsel to the airlines involved in the New Hampshire case, are able to advise this Court that no decision has been made on the question whether to appeal that decision. Since the New Hampshire statute affects a rather small number of passengers, and since a similar New Hampshire enactment went unchallenged for a number of years, the New Hampshire Supreme Court decision will have substantial import only if it encourages the enactment of similar head taxes by other states and localities. Accordingly, the decision whether to appeal in the New Hampshire case may be strongly influenced by this Court's disposition of the Petition in this case.

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the propriety of raising revenues by assessing proper charges on the commercial air carriers using the airport. *There is a need for revenue to support the airport,* but many of the facilities, such as expensive runways, could be provided on a lesser scale were it not for the use of the port by commercial jets. However, even if legislation such as Chapter 281 seeks to achieve good and necessary ends, it must do so in a fashion not impinging on constitutional rights."

154 Mont. at 361, 463 P.2d at 475 (emphasis added).

CONCLUSION

For all of the foregoing reasons the Petition for a Writ of Certiorari should be denied.

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